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Issue Date: 15 September 2006

CASE NOs. 2005-LHC-02654; 2005-LHC-02655

OWCP NOs. 15-48013; 15-48248

In the Matter of:

E.C.,
Claimant,

vs.

MARINE CORPS. COMMUNITY SERVICE,
Permissibly Self-Insured Employer,

and

CONTRACT CLAIMS SERVICES,
Claims Administrator.

Appearances:

Steven Birnbaum, Esq.
For Claimant

James Mesnard, Esq.
For Employer and Carrier

BEFORE: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves claims arising under the Longshore and Harbor Workers' Compensation Act as amended ("the Act"), 33 U.S.C. § 901 *et seq.*

A formal hearing was held in Honolulu, Hawaii on March 3, 2006, at which both parties were represented by counsel and the following exhibits were admitted into evidence:

Administrative Law Judge's exhibits ("ALJX") 1-3;[1] Claimant's exhibits ("CX") 1-10; and Employer's exhibits ("RX") 1-89. Transcript ("TR") at 9-13, 14-22, 66.

On March 21, 2006, Employer filed the deposition of Robert Martos, which had been admitted at the hearing as RX 89.

On April 4, 2006, Claimant submitted a letter requesting to withdraw his claim under section 48a of the Act because he "sees fit to pursue this claim under his union contract." This letter is hereby admitted into evidence as ALJX-4. Accordingly, I will not address or analyze any of the evidence relating to Claimant's section 48a claim.

On April 18, 2006, Employer filed a supplemental report from Dr. Robert Smith. On April 26, 2006, I issued an order to show cause why this report should not be admitted into evidence. On April 28, 2006, Claimant responded that he did not object to the report's admission into evidence. The supplemental report of Dr. Smith is hereby admitted as RX 90.

On April 27, 2006, Employer filed a declaration from Brian McCormack to authenticate the surveillance videos, which had been admitted as RX 60 and 61. On May 1, 2006, I issued an order to show cause why this declaration should not be admitted into evidence. On May 1, 2006, Claimant responded that he has no objection to admitting the declaration into evidence. The declaration of Brian McCormack is hereby admitted as RX 91.

On May 17, 2006, Employer submitted a letter stating that it does not object to admitting into evidence the May 6, 2006 report of Dr. Hager. Employer stated the report contains impermissible double hearsay and is based upon inappropriate assumptions, but that Employer would reserve these points for argument that Dr. Hager's opinions are not entitled to any weight. On May 19, 2006, Claimant filed Dr. Hager's May 6, 2006 report. Because Employer does not object, the report is hereby admitted into evidence as CX 11.

On May 31, 2006, the parties filed their post-trial briefs, which are hereby admitted as ALJX-5 and 6.[2]

On June 6, 2006, I issued a post-trial order regarding reply briefs, in which I reminded the parties that they were to submit reply briefs on the issue of average weekly wage.

On June 7, 2006, the parties filed their reply briefs on the issue of average weekly wage, which are hereby admitted as ALJX-7 and 8.[3]

[1] Claimant's Pretrial Statement is ALJX-1, Employer's Pretrial Statement is ALJX-2, and the Secretary's Notice of Appearance and Statement of Position is ALJX-3.

[2] Claimant's post-trial brief is ALJX-5 and Employer's post-trial brief is ALJX-6.

[3] Claimant's reply brief is ALJX-7, and Employer's reply brief is ALJX-8.

Due to some inconsistent statements in Claimant's post-trial brief, I issued an order to show cause on August 22, 2006, requiring Claimant to clarify whether he was pursuing his claim for traumatic injury allegedly occurring on July 1, 2003 or whether that claim had been withdrawn.

On August 23, 2006, Claimant's counsel filed a letter stating, "I am in receipt of your Order to Show Cause and can agree that no benefits are being sought for the original injury of July 1, 2003. There is therefore no need for this matter to be addressed by this court and we therefore withdraw this matter as an issue before this court." This letter is hereby admitted into evidence as ALJX-9. Accordingly, I will not address any evidence related to the alleged July 1, 2003 injury.

Stipulations:

At the hearing, the parties agreed to the following stipulations:

1. The Longshore Act applies to this claim.

2. Claimant allegedly injured his right knee on July 1, 2003 at the MCCS base at Kaneohe Bay, Hawaii.

3. At the time of the alleged injury, an employer-employee relationship existed between Claimant and Employer.

4. Claimant alleges cumulative trauma to his knee from February 23, 2003, when he was hired, through November 1, 2004, when he filed his claim.

5. Claimant's disability allegedly commenced on August 9, 2004.

6. Claimant alleges that he was temporarily totally disabled from August 9, 2004 through January 9, 2005.

7. Claimant reached maximum medical improvement on May 1, 2005.

8. Claimant returned to his usual employment with Employer on January 10, 2005, and continued to work there through the time of the hearing.

9. Claimant has outstanding medical bills.

10. Claimant has withdrawn his claim for a March 1, 2005 stress injury.

TR at 4-9. I accept all of the foregoing stipulations as they are supported by substantial evidence in the record. *See Phelps v. Newport News Shipbuilding & Dry Dock Co.,* 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 (1985).

Issues in Dispute:

1. Was Claimant's cumulative trauma knee injury claim timely noticed and timely filed under sections 12 and 13 of the Act?

2. Did Claimant suffer a cumulative trauma injury to his right knee, and did that injury arise out of and in the course of Claimant's employment with Employer?

3. If fact of injury and causation are found, what is the extent of disability (percentage loss of function)?

4. Is Employer entitled to relief under section 8(f) of the Act?

5. What is Claimant's average weekly wage?

TR at 6-7, 64.

SUMMARY OF DECISION

I find that Claimant timely noticed and filed his claim for the cumulative trauma injury under sections 12 and 13 of the Act. I also find that, as a result of his work for Employer from February 23, 2003 through November 1, 2004, Claimant sustained a cumulative trauma injury, which aggravated his pre-existing right knee condition. The extent of Claimant's permanent partial disability is 23.5%. Employer is not entitled to section 8(f) relief because Claimant's permanent partial disability compensation will not extend beyond 104 weeks. Claimant's average weekly wage is $661.92.

FINDINGS OF FACT

Personal and Employment History

Claimant was born on May 30, 1954 and raised in the state of Hawaii. RX 1 at 1; RX 57 at 6. Claimant applied to work for Employer at the MCCS base at Kaneohe Bay, Hawaii on December 26, 2002, and began work on February 23, 2003. TR at 289; RX 1 at 1; RX 2. On January 14, 2004, Claimant was hired by NANA Services, LLC, a private food service contractor on the base, to work part-time as a Food Service Worker. TR at 124-25, 187; RX 67. Claimant works for NANA Services five days a week from 4 p.m. to 7 p.m., after working for Employer from 7 a.m. to 3:30 p.m. TR at 125, 187; RX 57 at 59.

Claimant's job duties for Employer

Claimant's position with Employer is a Laborer Leader, which primarily involves supervising and performing grounds keeping duties. RX 3 at 1-2. As a "working leader," Claimant normally works with his crew. TR at 118; RX 57 at 22; RX 56 at 15. The position description states the following regarding the "physical effort and working conditions" involved:

> Work requires considerable walking, standing, stooping, bending, squatting, kneeling, climbing, twisting, reaching, stretching, and arm movement. Works in tiring, awkward, and uncomfortable positions. Frequently lifts, carries, and sets up tools, equipment and materials. Required to perform heavy lifting up to 100 pounds. Operates various tools associated with grounds maintenance work.… Exposed to possibility of scrapes, cuts, bruises, strains, s[p]rains, vibrations, and danger from flying debris. Exposed to the possibility of broken bones, electrical shock, skin irritation, burns, and infections….

Claimant spends thirty to forty percent of the day walking, including walking around to make sure there is no debris on the ground before using the sit-down lawnmower. TR at 113, 214. Claimant also does weed-whacking, which "can be heavy work to be holding a weed-eater for about six hours a day." TR at 214. Claimant does stooping, bending, and squatting, kneeling, climbing, and twisting daily or at least on a regular basis. TR at 113-15. He often has to work in tiring, awkward, and uncomfortable positions. TR at 115. He frequently must lift, carry, maintain and set up tools, equipment, and material. TR at 115. Claimant testified that he must do heavy lifting, most of which involves setting up tents. TR at 122. He also has to lift sandbags weighing twenty to twenty-five pounds with a shovel or by hand and carry them fifteen to twenty yards. TR at 122, 124. He walks on uneven ground and up hills. TR at 122. He uses heavy tools, including wrenches to tighten nuts and bolts and sledgehammers to pound down tent pegs. TR at 123. He digs with shovels, sometimes down three feet, to work on sprinkler systems. TR at 123. He conceded that not all of his duties involve heavy work. TR at 215.

The surveillance video taken of Claimant on January 26, 2005 confirms that he does at least some of the above activities in his work. RX 60. The video shows Claimant walking, standing, driving a truck, squatting slightly to pump gas into a truck and a gas can, loading and unloading a riding lawnmower from a trailer, climbing up onto a trailer and a lawnmower, bending to pick up debris from the ground and to attach a lawnmower to a trailer, and driving a riding lawnmower for long periods of time over somewhat uneven terrain. RX 60.

The biggest projects involved in Claimant's work for Employer are setting up large tents for celebrations and events. TR at 115. Every week or two, the labor crews set up from one to five tents, ranging in size from 10 by 10 feet to 30 by 40 feet, with the average being 20 by 40 feet. TR at 115, 121, 264. The crews set up many more tents and other equipment for Bayfest, which is a large, public event held by the Marines every year around the 4th of July. TR at 289; RX 57 at 32. Over a period of four or five days, Claimant's crew and Jesse Morgan's crew together set up about thirty tents of different sizes. TR at 120. Mr. Morgan estimated that they set up about three 20 by 40 foot tents, four or five 20 by 20 foot tents, three 15 foot tents, a couple of hex tents, and about twelve small ones. TR at 263.

The process of setting up a tent begins with getting the tent from the warehouse and loading and strapping it onto a trailer that is hooked up to a truck or van. TR at 117. Then, they manually carry the pipes, stakes, joints, and ropes. TR at 117. Claimant estimated that the pipes weigh thirty to forty pounds each. TR at 118.

Next, they must collect the cement blocks from the bone yard across from the warehouse. TR at 118. These concrete blocks are used to weigh down the tents and electric poles. TR at 265. The concrete blocks weigh 150 to 175 pounds. TR at 265. The blocks have rebars or handles on them for carrying and can be lifted by forklift. TR at 265. Claimant testified that the cement blocks must be manually lifted onto a pallet, and then they are lifted with a forklift onto the trailer. TR at 118-19. However, Mr. Morgan, the other Laborer Leader, testified that the blocks are already stored on pallets in the bone yard and are lifted by forklift onto trucks. TR at 266. Claimant's supervisors and co-workers wrote statements that concrete blocks are always supposed to be moved by forklift or two people, and Claimant was aware of these safety rules. RX 19 at 1; RX 20 at 1; RX 21; RX 22; RX 23. However, Mr. Morgan and Claimant's supervisor, Essie Opiana-Lee, each had observed Claimant lifting concrete blocks by himself and had told him that he should not be lifting blocks alone. RX 21; RX 23.

Then, all of the tent equipment is taken to the place where it will be set up. TR at 130. At the set-up area, "the forklift takes the [concrete] blocks off and take[s] them over to the area of the legs and then the men, two men per block, will take them to the leg and tie them down." TR at 266. Mr. Morgan explained the set-up process: "the poles are aluminum, so they're not that heavy….So, we should carry them. Everybody fully geared with safety gear. You lay the poles down in the form that the tent's going to go up and two men on each side lift up the middle pole and you start connecting it. Once you connect them to the connectors, then...maybe about six men, take the tarp and pull the tarp over and we fasten it down all the way around. We take hoists and hoist the line up." TR at 267. He explained that the hoists are transported on the truck and then set up on tripod stands. TR at 267-68. He continued explaining that they "take [the tent] from the back end and each person simultaneously on a count will start lifting the tent….We get the legs under it. Then we brace it, go to the other side, [and] lift the other side up with the hoist." TR at 268.

Claimant testified that setting up the tents "gets pretty hard at times." TR at 120. The hardest tasks are "just carrying the blocks and situat[ing] the blocks in a certain position." TR at 120-21. However, Mr. Morgan testified that setting up tents is not a heavy job "because we have the tools to set the tent up." TR at 267.

George Kelsey, one of Claimant's supervisors, agreed that the physical requirements of Claimant's duties range from light to very heavy work, and an employee would have to be in pretty good shape to do the job well. RX 56 at 15-16. Mr. Kelsey testified that most of the work is not that hard, but it is occasionally hard. TR at 372. Mr. Kelsey testified that the following aspects of Claimant's job are not heavy work: "Cutting grass in the riding mowers, weed whackers, blowers, small street vacuums, riding in trucks, supervising, doing training, even to the point of the tents because it's all mechanical-assisted, either through forklifts or lifts that crank up the tent. So, small percentage is actual heavy work and that would be related to the blocks that we've discussed and maybe the canvas that goes on the tent frame." TR at 385-86.

Claimant's job duties for NANA Services

Claimant generally "[p]erforms a variety of duties for the setup, delivery and service of food and maintains the cleanliness and orderliness of the dining hall and rest rooms." RX 68. Claimant's job description states that "the employee is regularly required to stand; walk; …climb or balance; stoop, kneel, crouch, or crawl...." It also states, "The employee must occasionally sit. The employee must frequently lift and/or move up to 50 pounds." RX 68. Claimant's duties include wiping tables, serving food, running the dishwashing machine. TR at 125-26, 293-94. Claimant did not recall lifting fifty pounds on a regular basis. TR at 126. He also testified that the job does not involve much strenuous walking. TR at 126. The hardest part on his knees is "standing or, if anything, pushing out the carts filled with dishes in them." TR at 127.

Claimant does not experience any knee pain from his work at NANA Services because his bosses are very understanding and allow him to work at his own speed. TR at 127. He testified that when he told his supervisors about his problems, they told him "if my leg had any pain or if I had any discomfort, for me to take it to the supervisor on duty, that I would be relieved from my duty that night, that I could go home and rest my leg." TR at 127. Claimant has never had to do this, and has never had any problems at NANA with his knee. TR at 128.

Medical History Relating to Claimant Knees: 1976-2002

Claimant has a rather extensive medical history involving many different injuries and ailments. *See* RX 39; CX 1. However, because the only remaining claim is for a cumulative trauma right knee injury, I have limited my focus to medical records history regarding Claimant's knees. I am explicitly not addressing any psychological history because the parties stipulated Claimant's psychological injury/stress claim has been withdrawn. Although the remaining claim is only for the right knee, I have noted periods of treatment for the left knee for purposes of comparison and because there are allegations that some of the records/testimony erroneously refer to the incorrect knee. *See* TR at 197-98.

Claimant did kickboxing in the early 1970s, and he also used to play baseball and volleyball. RX 57 at 25. Claimant wore a knee brace when playing these sports. RX 57 at 25.

While he was in the National Guard from 1976 to 1977, Claimant fell while running during basic training and hit his left knee. TR at 103, 197; RX 57 at 8. He was in a cast and walked around on crutches. TR at 104. He was honorably discharged before completing basic training because he had injured his knee. RX 57 at 7-8.

Claimant was treated for left knee problems from May through June 1987, RX 39 at 22-27, and from December through January 1987, RX 39 at 28-37.

On June 10, 1989, Claimant sought treatment from Dr. Yim for right knee pain and swelling over the previous week. RX 39 at 40. Dr. Yim's assessment was right knee osteoarthritis, and he directed Claimant to avoid increased knee activity for a week. RX 39 at 40. On July 24, 1989, Claimant followed up with Dr. Yim, who noted that the pain and swelling in his right knee were improved and directed Claimant to continue avoiding increased knee activity.

RX 39 at 41. On August 11, 1989, Claimant followed up with Dr. Yim for continued right knee pain and tightness. RX 39 at 45. Dr. Yim referred Claimant to orthopedist Dr. Jon Scarpino, who noted weakness in the right quadriceps and hamstring due to pain, minimal effusion within the joint, and exquisite tenderness over the medial joint line and over the medial femoral condyle. RX 39 at 42. Dr. Scarpino diagnosed a torn medial meniscus and a chondromalacia of the patella. RX 39 at 42-43. Right knee x-rays were performed on August 11, 1989 and showed no bony or soft tissue abnormalities. RX 39 at 44; RX 42 at 2, 5.

On August 16, 1989, Dr. Scarpino performed a right knee arthroscopy, which confirmed his diagnosis of torn medial meniscus in the right knee with minimal softening of the articular surface of the medial femoral condyle. RX 39 at 46. He also performed a partial medial meniscectomy. RX 39 at 46-47. Claimant followed up with Dr. Scarpino on August 18, 1989, August 24, 1989 and September 7, 1989, and was released to return to work with restrictions of "no heavy lifting or prolonged squatting." RX 39 at 48-50. On September 26, 1989, Claimant sought treatment for right knee swelling after doing his rehabilitation exercises. RX 39 at 51.

Minimal effusion of the right knee was noted on October 30, 1989 and November 6, 1989, when Claimant was being treated for unrelated injuries and problems. RX 39 at 54, 56.

Claimant was treated for left knee problems from October through November 1991, RX 39 at 71 -73, and from March through April 1992, RX 39 at 74-75. Claimant was again treated for left knee problems in March 1993, RX 39 at 79.

On December 16, 2002, Claimant was seen by Dr. Michael Smith for left knee pain and swelling. Dr. Smith noted, "Left knee pain since working in yard about 7-10 days ago with kneeling on it and bending a lot [and history] of arthroscopic surgery for tear in cartilage about 10 years ago with medial [joint] tenderness & small effusion today by my exam. [Diagnosis is] Osteoarthritis + overuse." RX 39 at 113-14. A left knee x-ray was performed and showed "no joint effusion, fracture, or loose body" and "slight medial joint space narrowing." RX 39 at 116; RX 40 at 10-11. On December 30, 2002, Claimant followed up with Dr. Smith, who noted that Claimant's left knee pain was much better and he had no more swelling. RX 39 at 116.

Medical History Relating to Claimant's Knees: 2003-present

Claimant testified that his knees were "fine" and "good" around the time he started working for Employer. TR at 112; RX 57 at 27.

After starting work for Employer in February 2003, Claimant was seen at Kaiser for problems unrelated to his knees on April 8, 2003; June 16, 2003; July 24, 2003; August 20, 2003. CX 1 at 63; RX 39 at 118; RX 39 at 119; RX 39 at 120; RX 39 at 122. Claimant also went to a chiropractor to address low back pain radiating into his right thigh and buttock on April 24, 2003; April 28, 2003; March 20, 2004; April 16, 2004; and September 1, 2004. CX 3; RX 59 at 65-66. On April 28, 2003, Claimant's chiropractor gave him a release from work from April 24, 2003 through April 28, 2003, and directed that he could return to light-duty work as of April 29, 2003 but that he should avoid mowing machines and prolonged sitting. RX 35 at 3.

Claimant testified at his deposition that he sought treatment for his right knee at Kaiser during the first ten months (between February and December 2003) that he worked for Employer. TR at 187; RX 57 at 51. In particular, Claimant testified that he went to the doctor for his knee pain "a week of two after" his alleged July 1, 2003 work injury. RX 57 at 36-37. He did not know why there was no record of such treatment, stating only that "after my injury, I was trying to take care of it on my own…" TR at 188. At trial, however, Claimant conceded that he did not seek treatment for his knee until January 2004. TR at 133, 189. He finally sought medical care at that time because his knee was swelling up, he was limping at times, and he required increased pain medications. TR at 132.

On January 9, 2004, Claimant was seen by Dr. Omori for complaints of right knee pain for the previous two weeks. CX 1 at 60-61; RX 39 at 124-25. Dr. Omori ordered an x-ray, which showed "evidence of tricompartmental degenerative disease. There are spurs on the posterior aspect of the patella. No definite evidence of interarticular loose body or joint effusion is seen." CX 1 at 59; RX 39 at 127; RX 40 at 10. Dr. Omori gave Claimant a slip to be off work from January 9, 2004 through January 12, 2004. RX 39 at 126.

On February 9, 2004, Claimant followed up regarding his right knee complaints. CX 1 at 56; RX 39 at 127.

On March 15, 2004, Claimant was seen by Deborah Bransford, R.N., who noted that his right knee pain was not better. RX 39 at 130. Claimant was referred to physical therapy for right knee osteoarthritis. CX 1 at 55; RX 39 at 129, 131.

On March 20, 2004, Claimant reported right knee soreness to his chiropractor. CX 3 at 72.

On April 30, 2004, Glen Teramoto, PT, who noted that Claimant "began having increase in right knee pain for the last few months. No[w] also [complains of] left knee pain. He does heavy lifting for his jobs. [Complains of] constant knee pain and taking motrin all day to control pain...located in the medial joint line of both knees." CX 1 at 51; RX 39 at 135.

Also on April 30, 2004, Dr. Mark Santi noted that Claimant's 1989 arthroscopy procedure "helped him quite a bit [but the] pain is returned now, however, his right knee bothers him fairly often. The pain in primarily medially." CX 1 at 51; RX 39 at 133. Dr. Santi's assessment was a possible recurrent meniscal injury. CX 1 at 54; RX 39 at 133.

On May 3, 2004, Ms. Bransford noted that Claimant complained of increased knee pain for which he needed to take increased pain medication. She also noted that he complained of "right foot/ankle pain—not sure if it's related to his limping due to his knee pain." RX 39 at 136. Ms. Bransford, in consultation with Dr. James Yamashita, switched Claimant's pain medication to obtain better control of his right knee pain and also assessed that his right foot/ankle pain was most probably related to his limping. RX 39 at 137. Claimant was given a work slip for May 4 and 5, 2004. RX 39 at 137, 140. Ms. Bransford also referred Claimant to a behavioral medicine consultant partially because he was having trouble "working two jobs while

having chronic knee pain." RX 39 at 139. On May 6, 2006, the consultant noted that Claimant was anticipating surgery in August. RX 39 at 139.

An MRI conducted on or around May 15, 2004 showed "abnormal increase marrow signal seen in the medial aspect of the tibial plateau with a possible small subchondral fracture at the lateral margin of the medial plateau. There is adjacent oblique linear signal seen within the posterior horn of the medial meniscus extending to the inferior articular surface compatible with a tear." CX 1 at 58; RX 40 at 7.

On May 21, 2004, Dr. Santi noted that Claimant "returns today saying his knee feels about the same. Still has a small amount of pain medially…. He has some tenderness medially with McMurray…. MRI is consistent with a medial meniscal tear…. [Claimant] had previous surgery and there is some early arthritis in the knee, but I think his main problem is probably the meniscal injury." CX 1 at 50; RX 39 at 141. Dr. Santi assessed a medial meniscal tear and recommended arthroscopic surgery. CX 1 at 50; RX 39 at 141.

On or around June 21, 2004, Dr. Santi gave Claimant a slip releasing him to limited duty work with no lifting until August 9, 2004, the date of his right knee arthroscopy surgical procedure. RX 39 at 142, 143.

On July 23, 2004, Claimant followed up regarding his knee problems and was given a work slip to be off work from August 9, 2004 through November 9, 2004 for his surgery and recovery. CX 1 at 48-49; RX 4; RX 39 at 144,146.

On July 30, 2004 and August 6, 2004, Claimant was diagnosed with right knee integral derangement and was prepared for his upcoming surgery. CX 1 at 39-46.

Claimant testified that he decided to have surgery because his knee was getting worse between January and August 2004 and "[i]t got to a point that I was no longer [going] to be able to walk comfortably with my right knee, only because the swelling was up and even when I went home during the night, my swelling was still up when I had to ice my knee and it was getting to be a continuous basis." TR at 135-36. Claimant testified that his surgeon estimated his recovery would take about three months. TR at 136.

On August 9, 2004, a right knee arthroscopy and partial medial meniscectomy were performed by Dr. Santi. CX 1 at 23-38; RX 39 at 147-48. The surgical findings "showed the patellofemoral joint to have some disease to the medial condyle. It was grade 2 in one area right underneath the patella. The patella itself looked fairly well maintained. The medial and lateral gutters were without loose bodies. The medial meniscus had a degenerative tear of the posterior one-half. There were some grade 1 and grade 2 changes throughout the medial joint." CX 1 at 28; RX 39 at 148.

On August 16, 2004, Dr. Santi found that Claimant had full range of motion in his knee and should continue strengthening and range of motion exercises. CX 1 at 22; RX 39 at 151.

Claimant was evaluated and treated with physical therapy by Kathy Baker-Sawyer and Dayton Uyeda on August 18, 2004; August 20, 2004; August 23, 2004; and August 27, 2004. CX 1 at 19-21; RX 39 at 152-53.

On September 9, 2004, Dr. Santi reevaluated Claimant's knee and found he was "doing quite well." He directed Claimant to continue his exercises. CX 1 at 18; RX 39 at 157-58.

On September 24, 2004, Claimant sought treatment for left wrist pain, stating that he had fallen on it about a month earlier. CX 1 at 15-16. X-rays of Claimant's wrist showed "no radiographic evidence of fracture, subluxation or other bony abnormality." CX 1 at 14, 17.

On September 28, 2004, Claimant was evaluated for continued left wrist pain and a second left wrist x-ray was performed, which showed no significant change since the September 24th x-ray. CX 1 at 12, 15; RX 40 at 3; RX 39 at 161. Robert Null, PA-C evaluated Claimant's left wrist after the fall and right knee after the surgery, and directed Claimant to remain off work until October 26, 2004. CX 1 at 13; RX 39 at 159-60.

On October 12, 2004, Mr. Null and Dr. Santi filled out a claims insurance information form, stating that Claimant was disabled at least until his next visit, due to his left wrist fracture and his right knee meniscectomy. RX 39 at 162.

On November 1, 2004, a third left wrist x-ray was performed, which showed "no definite radiographic evidence of fracture healing." RX 40 at 2. Also on November 1, 2004, Mr. Null noted that Claimant's wrist fracture was healing, and directed Claimant to remain off work until at least November 29, 2004. CX 1 at 10-11; RX 39 at 164-65.

On November 29, 2004, a fourth left wrist x-ray was performed and showed "no definite fracture." RX 40 at 1. Mr. Null found that Claimant's wrist fracture was healing and directed Claimant to remain off work for another month. CX 1 at 9; RX 39 at 166-68, 170.

On December 10, 2004, Claimant was evaluated for physical therapy for his left wrist. RX 39 at 171. He received physical therapy for his left wrist on December 22, 2004 and December 27, 2004; January 5, 2005; and January 7, 2005. RX 39 at 172, 175.

Claimant received physical therapy for his right and left knees on December 22, 2004; December 29, 2004; January 5, 2005; and January 7, 2005. RX 39 at 174.

On January 3, 2005, Dr. Santi reevaluated Claimant's right knee surgery and found that he could return to work on January 10, 2005. CX 1 at 8; RX 39 at 173, 176, 176. Similarly, Mr. Null found that Claimant was unable to return to work from December 29, 2004 through January 9, 2005, and directed that when he returned to work, he should do "no heavy lifting more than one hour at a time for one month." CX 1 at 7; RX 39 at 177-78.

Filing, Processing, and Investigation of Claimant's claim

On March 4, 2003, Claimant received an orientation and was given materials and information stating that he was required to notify his supervisor immediately if he was ever injured at work. RX 65; RX 69; RX 70; TR at 184, 345.

Mr. Kelsey testified that Claimant "stated to me that after he was hired, on kind of a side note, that he was really thankful that he was able to get the job and it meant that later on down the road, that he would have the capability of having his knees looked at and possibly operated on." TR at 351-52. *See also* TR at 369-70. Mr. Kelsey estimated that his conversation occurred within a month of Claimant being hired. TR at 369. However, in the statement he wrote in December 2004, Mr. Kelsey wrote that Claimant "had started talking about having knee surgery several months after he became employed by MCCS….This was well before Bayfest 2003." RX 19 at 2. Similarly, another of Claimant's supervisors, Earl Correa, wrote, "Prior to BayFest03, [Claimant] brought to light that he needed knee surgery and it was an old injury from his younger days. He said that both knees bothered him and he would operate on one knee at a time but had financial and scheduling difficulties…" RX 20 at 1.

Claimant denied telling Mr. Kelsey that he was glad he had been hired because he needed health insurance to get knee surgery. TR at 193. Claimant could not remember whether he had knee problems or whether he discussed having knee problems with his co-workers between when he was hired and Bayfest 2003. RX 57 at 28, 30-31.

Prior to Bayfest 2003, Claimant had complained of knee pain to other employees, including Ms. Opiana-Lee, Mr. Morgan, and Garrett Han, and he had told them that he had knee problems. TR at 282-84; RX 21; RX 23; RX 24; RX 54 at 20. Ms. Opiana-Lee and Mr. Han each stated that Claimant told them his knee problems were from playing sports. TR at 232; RX 24. Mr. Kelsey testified that he understood that Claimant had problems with his knees, but did not think about whether his work would worsen his knees "because he said he was capable of doing the job as it pertained to his description." TR at 371. Mr. Kelsey denied being on notice that Claimant's work might create more knee problems because he did not know "what the actual conditions of the knees were. I never had a diagnosis of what the conditions were. There could be most anything wrong with a knee." TR at 371-72. Mr. Kelsey emphasized that even though he knew Claimant had knee problems and needed surgery, "there was no reason to inquire about any 'injury' as his knee problem was pre-existing condition." RX 19 at 2.

Sometime in 2004, Claimant's co-workers and supervisors noted increased knee complaints and general exhaustion, which they attributed to his second job. Mr. Kelsey wrote, "The only time that [Claimant] showed some signs that his legs were bothering him was after he took his night time job at the Anderson Mess Hall on base….The effects of the extra job started showing up in June [2004]…. At this point the only observations of [Claimant's] physical condition was exhaustion." RX 19 at 2. Ms. Opiana-Lee also wrote that, after he started his second job, Claimant would complain that his feet and knee hurt and she "told him many…times that he shouldn't be working the other job if his knee keeps hurting. I also told him he should be wearing a knee brace." RX 21. Similarly, Mr. Correa wrote, "I recall seeing [Claimant] with a limp (for a couple of days and not a month) but it was more recent th[a]n July or August 2003

but can't remember the exact time. He said working for us (MCCS) and at the Mess Hall (contractor) during the evenings standing between 12-14 hours a day was 'taking a toll on him physically.' I told him lots of people have Gout and don't know it. He said it was poor circulation and was going to have a blood test." RX 20 at 1. *See also* TR at 291.

However, Claimant testified that his second job did not cause any extra strain on him physically until after his August 2004 surgery. RX 57 at 60. He returned to work for NANA Services and for Employer on the same day in January 2005. RX 57 at 60. Mr. Kelsey testified that after Claimant returned to work after his surgery, "going back to the second job was kind of wiping him out" and he was "exhausted at the end of the day." RX 56 at 13-14.

At some point in 2004, Claimant notified his supervisors, including Ms. Opiana-Lee, Mr. Kelsey, and Humphrey Chun, that he was to have surgery after Bayfest 2004. RX 19; RX 21; RX 22. Mr. Kelsey wrote, "One of [Claimant's] objectives was to get his leave usage under control so he could start building reserve time for his surgery. This plan was discussed quite often….There was concern that Earl and I voiced to [Claimant] about making it through Bayfest 2004 without aggravating his knee and impact his surgery. [Claimant's] response was that he would keep it in check and pace himself to get through Bayfest." RX 19 at 2.

Although they were aware of Claimant's upcoming surgery, Claimant's supervisors, including Mr. Kelsey, Mr. Correa, and Mr. Chun, denied knowing that is was work-related. RX 56 at 11-12; RX 58 at 32; RX 22. In particular, Mr. Chun wrote, "I asked [Claimant] in August 2004 what was the nature of the surgery and he said that he was having knee surgery. There was no indication that the injury was job related since no injury report was filed." RX 22. On the other hand, Claimant testified at his first deposition that at some time before his surgery, he mentioned to Ms. Opiana-Lee and Mr. Correa and several co-workers that he was having the surgery because he injured his knee at Bayfest 2003. RX 57 at 43-47; TR at 195-96.

On or around August 4, 2004, Claimant applied to become a leave recipient in Employer's leave donation program, as he did not have sufficient accrued leave to be paid while out for surgery and recovery. RX 7; TR at 196. This was approved by Maria Gompers and/or Mr. Kelsey on August 19, 2004. RX 8; 348. Two employees donated one day of leave each to Claimant. RX 9; RX 10.

On or around August 6, 2004, Claimant submitted a request for time off under the Family and Medical Leave Act. RX 5; TR at 195-96. Also at that time, Claimant submitted a request to use vacation and sick leave during the time he would be out. RX 6.

On September 23, 2004, Claimant called and told Mr. Kelsey and Mr. Correa that "he fell going down the stairs in his apartment building because his knee buckled out from under him" and he had broken his wrist. RX 20 at 1. He informed them that this new injury "would extend the time that he would be out and it was affecting his rehabilitation for his knee." RX 19 at 2-3.

During his recovery after surgery, Claimant decided to file a worker's compensation claim because he had been working and suffering with an injured knee for a year without any compensation and he was in a desperate financial situation. RX 57 at 49; TR at 137. Claimant

had previously been reluctant to file an accident report or make a claim for worker's compensation because he was worried about losing his job while he was still under probation, TR at 129-31, 182-83, 193, he did not realize the seriousness of his knee condition and thought it might get better, TR at 130, 136, 193, and he did not know what the procedures were or who to contact about filing a claim. RX 57 at 47, 50.

Once he decided to file a claim around November 2004, Claimant contacted Ms. Gompers, Ms. Opiana-Lee, and Mr. Kelsey, each of whom asked him why he did not file an injury report earlier. TR at 138-40. Mr. Kelsey gave Claimant the relevant paperwork, which Claimant never brought back. TR at 380. *See also* RX 56 at 8-9; RX 56 at 11.

On November 1, 2004, Claimant filed a claim for compensation (LS-203), in which he alleged that he had first injured his right knee at work in 2002 [sic – should be 2003] and then suffered cumulative trauma. RX 11.

On November 4, 2004, Employer filed its first report of injury form (LS-202), in which it alleged that it first learned about this injury upon receiving Claimant's LS-203 on November 3, 2004. RX 12. Also on that date, Employer filed a notice of controversion (LS-207) based on the following: "No medical to support an on the job injury. Claim is denied pending further investigation. Late reporting. All medical treatment has been self procured. As for the LS-203 dated 11/01/04, number 28, the Employer HAS NOT provided such medical treatment." RX 13.

On December 6, 2004, Ms. Gompers sent an email to Mr. Kelsey requesting information as part of her investigation of Claimant's claim. RX 19. Ms. Gompers also obtained statements on December 9, 2004 from Claimant's supervisors and co-workers, including Mr. Correa, RX 20, Ms. Opiana-Lee, RX 21, Mr. Chun, RX 22, Mr. Morgan, RX 23, and Mr. Han, RX 24. Mr. Kelsey testified that when he received Ms. Gompers' e-mail, he "did do a quick survey of other employees [including Mr. Correa and Mr. Chun], but most of the answers were straight from my recollections and my files." TR at 386. Mr. Kelsey testified that they would have been able to do a more thorough investigation of Claimant's alleged July 1, 2003 injury if they had been notified at the time, but otherwise, he was not aware of any problems investigating Claimant's claim. TR at 365-66.

Mr. Kelsey and Mr. Correa each testified that he did not become aware that Claimant was alleging a work injury until he "got an e-mail from Maria Gompers with a list of questions" on December 6, 2004. TR at 291, 343; RX 19; RX 20. Mr. Correa testified that Claimant never reported to him, or anyone else to his knowledge, that he had injured his knee at work or that he thought his right knee condition was due to repetitive use at work. TR at 290, 293. All of Employer's representatives asserted that if Claimant had notified a supervisor of a work-related injury earlier, a report would have been filed. TR at 231, 290; RX 54 at 19-21; RX 56 at 8-11.

On January 3, 2005, Employer filed a second notice of controversion (LS-207) in which it stated, "Employer/Carrier controverts the DOL recommendations of 12/20/04. Please amend the recommendations to reflect that the Employer/Carrier did raise section 8(f) at the conference." RX 14.

On February 11, 2005, Employer subpoenaed all of Claimant's medical records from Kaiser's Honolulu Clinic. RX 34.

Medical expert opinions regarding causation and extent of disability

On April 11, 2005, Claimant was examined by Dr. Robert Smith, M.D., Employer's independent medical examiner. RX 42 at 1. Dr. Smith issued a report on April 21, 2005. RX 42. He also conducted an independent review of Claimant's imaging studies, including the January 9, 2004 right knee x-ray, the May 15, 2004 right knee MRI, and the four left wrist x-rays from September and November 2004. RX 42 at 32. Dr. Smith opined that there was no objective evidence that Claimant injured his right knee on July 1, 2003. RX 42 at 33-34. He also opined that Claimant's right knee surgery on August 9, 2004 and his subsequent inability to work until January 10, 2005, were not attributable to the July 1, 2003 incident, but rather, were due to a pre-existing condition. RX 42 at 35. Lastly, Dr. Smith also opined that "the records reflect obfuscation and do not reflect any objective medical evidence that the reported fall that caused [Claimant] to injure his left wrist was the result of the right knee injury or surgery. The fall is not well documented." RX 42 at 36.

On May 7, 2005, Gilbert Perry Hager, M.D. Claimant's medical expert, interviewed Claimant, and on May 14, 2005, Dr. Hager examined Claimant. CX 4 at 74. On May 30, 2005, Dr. Hager issued a permanent partial impairment rating report for Claimant. CX 4. His diagnostic impressions included "1. Right knee internal derangement with recurrent tearing of the medial meniscus; 2. Subchondral tibial plateau fracture of the right knee; 3. Aggravation of right knee osteoarthritis by cumulative trauma in the work place." CX 4 at 77. Dr. Hager opined that "the recent injuries to the right knee are the result of the work related injury on July 1, 2003 and cumulative trauma to the knee resulting in the need for arthroscopic repair of the right knee in August 2004." CX 4 at 78. He stated that Claimant "has been working in a position that clearly has caused cumulative injury to his right knee….[quoting from Claimant's position description] Working in this job with a knee meniscus injury would undoubtedly result in further cumulative injury and worsening of whatever arthritic condition preexisted the injury." CX 4 at 78. Dr. Hager also stated, "The right knee should be considered stable at the time of his return to work on January 10, 2005 with the caveat that if he continues doing the kind of heavy work required by his current job the knee will undoubtedly worsen with further cumulative trauma." CX 4 at 78. Dr. Hager found that Claimant had a 7% lower extremity impairment, based on the AMA Guides ratings of 2% for the right knee partial medial meniscectomy and 5% for the undisplaced subchondral right tibial plateau fracture. CX 4 at 78.

On June 8, 2005, Dr. Smith wrote an addendum, in response to Dr. Hager's May 30, 2005 report and addressed the issue of cumulative trauma. RX 73. Dr. Smith noted that his opinions were based on independent review of the imaging studies, while Dr. Hager's opinions were not. RX 73 at 1. He also noted that "if Kaiser determined that the [August 9, 2004] surgery was based on any industrial injury, [Claimant] would have been operated on by Dr. Van Meter, and Dr. Santi would not have been allowed to perform the surgery. This protocol was established by administrative decree of Kaiser." RX 73 at 2. Dr. Smith responded to each of Dr. Hager's diagnoses as false or not supported by objective evidence. RX 73 at 3-4. Dr. Smith also opined that Claimant's "8/9/04 right knee surgery was necessitated by the pre-existing degenerative

condition, and not an alleged 7/1/03 injury or cumulative trauma." RX 73 at 4. Dr. Smith argued that the data from Claimant's medical records of treatment for knee problems since 1987 and his complaints to co-workers about pre-existing knee pain and need for surgery "documents that causation has not been established for the 8/9/04 right knee surgery being necessitated by the alleged 7/1/03 injury or by cumulative trauma. The cumulative data however documents that the 8/9/04 right knee surgery was necessitated solely by the preexisting condition." RX 73 at 4-6.

On February 3, 2006, Dr. Smith issued a supplemental report, which focused primarily on "the new industrial accident of 11/2/05." RX 84 at 33-35. Although Claimant did not initiate any discussion regarding his knees or indicate any knee pain on his pain drawings, Dr. Smith "specifically asked [Claimant] if he had any residual pain in either knee, and he stated that from time to time he experiences pain on the medial side of both knees." RX 84 at 33. In addition to restating his earlier opinions with regard to causation, Dr. Smith also wrote, "[Claimant] states that his job at Kaneohe Marine Base is that of a field supervisor with a physical demand level different from the workers under him. The physical demand level of the workers that he supervises is approximately 100 pounds." RX 84 at 34. With regard to the impairment rating for Claimant's right knee, Dr. Smith stated that the partial medial meniscectomy performed on August 9, 2004 is ascribed a 2% rating under the AMA Guides, but that this surgery was not necessitated by Claimant's work for Employer. RX 42 at 37.

On February 14, 2006, Claimant underwent standing x-rays of both knees taken by Dr. John Chan, at the request of Dr. Hager. CX 10 at 93. The x-rays showed "evidence for fairly moderate loss of femoral tibial joint space. With respect to the right knee, there is approximately 1.3 mm of knee joint space medially…." CX 10 at 93. The impression was "moderate bilateral degenerative changes of both knees seen most prominently medially." CX 10 at 93.

On April 13, 2006, Dr. Smith wrote that review of the February 14, 2006 x-rays did not change his opinion regarding causation, but did change his opinion regarding the degree of impairment. RX 90 at 2-3. He stated, "Upon my review of the film, I disagree slightly with the measurements [of Claimant's medial knee joint space] provided…[because] there is no documentation that the x-ray taken conforms to the standard required for ascribing arthritis impairments, as delineated in the AMA Guides. My measurement with a translucent millimeter ruler indicates that there is approximately 2 mm of knee joint space medially in the right knee…. A knee joint cartilage interval of 2 mm would qualify for 20% lower extremity impairment." RX 90 at 2. He further explained, "my measurements are somewhat discordant with that of the radiologist, and it should be noted that measurements of roentgenographically determined cartilage intervals may vary, depending on the film-to-camera distance and whether or not the beam is at the level of and parallel to the joint surface. Thus, the measurement of knee joint space is an estimate, at least." RX 90 at 3. Dr. Smith opined, "While the current imaging film indicates some degree of impairment as the result of arthritis, this impairment is related to the natural progression of the pre-existing condition, and as previously reported, not to any July 1, 2003 injury or cumulative trauma at work." RX 90 at 3-4. He reiterated Claimant's 2% impairment from the partial meniscectomy was also not work-related. RX 90 at 3.

On May 6, 2006, Dr. Hager reiterated his opinion that working with duties such as those described for Claimant's job "with [existing] knee meniscus damage would be expected to result in cumulative injury and worsening of any preexisting arthritic condition." He also emphasized that Claimant "may have had preexisting right knee problems, but he was able to work without difficulty until his injury of July 1, 2003 and associated cumulative trauma related to his heavy duty job." CX 11 at 95. Dr. Hager also stated that that Dr. Cieply at Queen's Medical Center had confirmed that "the images were taken digitally by standard procedure and the meniscal measurements were made electronically." CX 11 at 94. Dr. Hager stated, "Dr. Smith's impairment rating is based on his estimate made with a translucent ruler of 2 mm of cartilage in the right knee. Dr. Smith's rating should be disregarded as it is not as accurate as a rating based on electronic measurement performed by a radiologist at Queen's Medical Center." CX 11 at 95.

Dr. Smith's deposition testimony

Dr. Smith testified by deposition on February 6, 2006. RX 86. He is a board-certified orthopedic surgeon, is board-qualified in physical medicine and rehabilitation, and is a certified spinoscopy reader. RX 86 at 4-5; RX 41. Dr. Smith testified that for at least the last two years, his "practice is 98 percent doing independent medical evaluations, partial permanent disability evaluations and being an expert witness in court." RX 86 at 27, 28. He works "primarily" on behalf of employers and insurance companies, but there have been "a few occasions" when he has given opinions for plaintiffs or injured workers. RX 86 at 29. Although he accepts requests to do medical evaluations from either side as they come, Dr. Smith conceded that "the number of requests just happen to be statistically largely skewed toward the defense." RX 86 at 71.

When asked about a statement he had made about Dr. Hager in an earlier case, Dr. Smith stated, "I would say that is based on years of experience with Dr. Hager, who I find is often spurious and not truthful and who provides erroneous diagnoses that are not substantiated by fact. And so I tend to look at anything that Dr. Hager says with a little bit of bias, or jaundiced eye, and then I try to mitigate against what I would consider, you know, erroneous conceptions or false diagnoses that he makes." RX 86 at 33. Dr. Smith also agreed that he feels he has to automatically question the validity of the treatment when he sees a patient treated by Dr. Hager, and he emphasized, "that's not only my opinion, but it's the general consensus of a good many doctors in the community." RX 86. Dr. Smith admitted to calling Dr. Hager part of "an a[xi]s of evil," which he explained relates to "those doctors who work for plaintiff's [sic] attorneys and manufacture false diagnoses and manufacture treatment protocols that tend to prolong treatment and manufacture disability that is not evidence based." RX 86 at 36. Dr. Smith also elaborated on his opinions that the worker's comp[ensation] system is abused by doctors and medical facilities for financial gain. RX 86 at 40-42. He sees his role as an independent medical examiner challenging diagnoses that are not based in fact. RX 86 at 40-42.

Dr. Smith stated, "when Dr. Scarpino operated…on his right knee …back in 8-16-89, Dr. Scarpino noted a medial synovial plica which is a condition that arises usually as a congenital variant or remnant of a congenital developmental synovium, and when that medial synovial plica rubs against the medial femoral condyle it often causes erosion of the cartilage, and Dr. Scarpino noted that and actually excised that in his '89 operation. It's quite likely many, many times after excising that it does recur. So, in my opinion, the evidence supports that the right knee surgery

performed on 8-9-04 was due to a preexisting condition." RX 86 at 15. However, Dr. Smith admitted that although the August 9, 2004 surgical findings showed some disease or damage to the medial condyle that was the result of the previous plica, there was no documentation that the plica had indeed recurred. RX 86 at 48-49. Dr. Smith also conceded that the damage from this previous condition made Claimant's knee more vulnerable to pressure or stress. RX 86 at 63.

Dr. Smith opined repeatedly that there was no objective evidence of cumulative trauma from Claimant's work. RX 86 at 45, 52-53, 59-60, 68-69. He stated that objective evidence of cumulative trauma would be recurrent episodes of effusion or recurrent episodes of buckling or giving way of the knee, but that increasing pain is not necessarily related to cumulative trauma. RX 86 at 45, 69. However, he later described lack of effusion as proof that there was no *acute* trauma or tear. RX 86 at 64-65.

Dr. Smith stated that he considered the physical requirements and working conditions listed in Claimant's job description when he rendered his opinion regarding cumulative trauma. RX 86 at 45. Dr. Smith assumed Claimant did activities listed in his job description, but he did not assume Claimant did all of those activities every day since it "is a job description of possible things that he might do at any particular time." RX 86 at 52, 73.

Dr. Smith gave conflicting testimony regarding Claimant's work duties and activities of daily living. When asked whether "the physical effort and working conditions that…[Claimant] engaged in, in over a year of work,…including…considerable walking, standing, stooping, bending, squatting, kneeling, climbing, twisting, reaching, stretching and arm movement did not hasten, accelerate or worsen the previously diagnosed osteoarthritis," Dr. Smith responded, "that's my opinion, and it's based on the fact that these are activities of daily living, and there's nothing in the records to favor a cumulative injury." RX 86 at 54. However, Dr. Smith later described how activities of daily living cause progression, especially in a person who has had a partial medial meniscectomy, because there are "adverse biomechanics whereby there's great force on the cartilage that surfaces the bone, and even with activities of daily living, such as getting out of bed in the morning, will put adverse stresses on the cartilage, and over a period of time there will be a natural progression of wear of the cartilage and osteoarthritis progresses." RX 86 at 59. He conceded that everyday activities degenerate a torn meniscus because "[o]nce [tissues] have undergone damage, they aren't a hundred percent repairable, and so you don't have a normal meniscus there once you've had a partial meniscectomy. And so, [it degenerates] with wear and tear over time." RX 86 at 67.

Dr. Hager's trial testimony

Dr. Hager testified for Claimant as a medical expert. TR at 35, 38, 40. He is a physiatrist, board certified in physical medicine and rehabilitation. CX 7 at 90. As a physiatrist, he specializes in maximizing function of people, especially after injuries. TR at 36, 40. He has specialized training and experience in diagnosing knee problems, rating impairments using the AMA Guides, and reading MRIs and x-rays. TR at 36-37, 41. He testified that about ten percent of his practice deals with knee complaints. TR at 41. Dr. Hager did not treat Claimant, but saw Claimant three times for purposes of evaluation. TR at 42.

Dr. Hager testified that he spends ninety-eight percent of his time treating patients and two percent evaluating people for attorneys. TR at 41. On cross-examination, he explained that one-hundred percent of his patients are "pursuing benefits from insurance companies," although he qualified that by stating that "patients pay some co-payments and there are some patients who pay cash payments, but most of the reimbursement comes through the insurance matters." TR at 75. He estimated that forty percent of his patients are in worker's compensation cases where he is the treating physician, rather than a medical-legal consultant. TR at 76, 80. Another thirty to forty percent of his patients are in motor vehicle accident insurance cases, and ten percent are patients who pay out-of-pocket or through private medical insurance. TR at 76-77, 82.

Dr. Hager testified that "acute trauma would be something that happens…at the time of the knee being struck or twisted or jumped upon." TR at 39. In contrast, cumulative trauma "would refer more to small microtraumas that occurred over time or not so small in some cases with respect to activities that were over and above…what's expected in the course of daily life." TR at 39. He explained that "the word 'trauma' refers to the fact that there's an extra-normal event occurring at the knee…[and] the cumulative part means that the knee or whatever joint we're talking about is subjected to…repetitive trauma or forces of weight-bearing or torsion." TR at 39. He testified that cumulative trauma to the knee is caused by "activities that were more than normal activities in terms of weight-bearing, in terms of stress on the joint with respect to…axial forces from jumping or lifting or twisting, torsion forces on the knee." TR at 38-39.

Dr. Hager was aware of Claimant's prior knee problems and opined that the natural progression of Claimant's knee symptomatology has been "hastened and accelerated by the work activity." TR at 56-57, 89. He stated, "I would expect a cumulative trauma to occur in a knee that has had that kind of problems [sic]…." TR at 49. Consequently, Dr. Hager opined that he "would not have recommended that [Claimant] continue to work under that job description." TR at 49. He opined that Claimant's work activities between February 2003 and August 2004 caused cumulative trauma to his knee. TR at 52, 57, 90. In particular, he opined that "climbing, stooping, kneeling, crouching, crawling, and frequently lifting and/or moving up to 50 pounds," as well as lifting and carrying hundred-pound blocks of concrete, could cause cumulative trauma to the knee. TR at 93.

Dr. Hager based his opinion regarding causation on "a combination of [Claimant's] job description and the patient's description of his actual activities." TR at 84. He reviewed the job description with Claimant for accuracy and found that his actual activities were pretty close to the job description. TR at 84-86. He explained that Claimant's job duties extend beyond activities of daily living. TR at 45. Dr. Hager had seen the tents and concrete blocks at Bayfest. TR at 84. He conceded that he did not know the concrete blocks were often lifted by a forklift, but emphasized that Claimant had often lifted them by hand as well. TR at 85.

Dr. Hager opined that Claimant's August 2004 surgery was due at least in part to cumulative trauma from working for Employer. TR at 90. Dr. Hager opined that the surgery was done "to repair injury to the knee that was ongoing and getting worse." TR at 56.

Dr. Hager conceded that the description of physical demands for Claimant's second job included some activities that would cause cumulative trauma, but he "would want to know how much of those activities he actually engaged in." TR at 94.

With regard to the degree of impairment to Claimant's right knee, Dr. Hager testified that "The best way to get the most precise measurement is not by putting a film up on the view box and putting a ruler up [as Dr. Smith did] but by having the computer measure it and that's what I asked Dr. [Cieply at Queen's Medical Center] to do." TR at 56. Dr. Hager testified that "the best and really only valid way to test or to measure…how much impairment there is in the knee" is to measure the cartilage. TR at 40. He explained that the cartilage is worn away and sometimes torn by cumulative trauma. TR at 40. He further explained that "on an x-ray, the importance of the gap between the bones is that's where the cartilage lives because it doesn't show on the x-rays. So, we're seeing a measurement really of the cartilage interspace in the knee, especially in the standing film." TR at 61. He also explained why the AMA Guides call for use of standing x-rays. TR at 58-61.

Dr. Hager explained that Dr. [Cieply] found 1.3 mm of right knee joint space medially, where normal measurement should be greater than or equal to 4 mm. TR at 59. He explained that the AMA Guides "indicates that knee cartilage of 1 mm results in…25-percent lower extremity impairment" and knee cartilage of 2 mm results in a 20-percent impairment. TR at 62. The AMA Guides do not provide impairment ratings for tenths of millimeters, so he estimated that Claimant's 1.3 mm knee cartilage measurement would result in a 23-percent impairment rating. TR at 62. Dr. Hager added that the AMA Guides assign an additional 2% impairment rating based on having had a partial meniscectomy. TR at 62-63. However, Dr. Hager hesitated to say that the entire 25% impairment was due to Claimant's work for Employer, stating "I would probably subtract out the partial meniscectomy that happened in '89 which would bring you back down to 23 percent." TR at 64.

Dr. Hager testified that he examined Claimant and noted "minimal atrophy of the thigh musculature on the right," but he did not measure the atrophy because there is nothing in the Guides that provides additional impairment for that. TR at 88.

With regard to Claimant's need for future medical treatment for his knees, Dr. Hager opined that Claimant is already a candidate for Synvisc injections to the knee to forestall further surgical intervention, and will eventually need total knee replacement. TR at 66-68.

ANALYSIS

1. Section 12 and 13 Timeliness

a. Section 12 – Notice of Injury

Section 12(a) requires that notice of an injury for which compensation is payable be given within thirty days after the date of the injury, or within thirty days after the claimant is aware of a relationship between the injury and his employment. 33 U.S.C. § 912(a). Failure to give timely notice is excused if the employer had actual notice within the limitations period or

the employer was not prejudiced by the lack of timely notice. 33 U.S.C. § 912(d). The employer bears the burden of establishing by substantial evidence that it was prejudiced. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). An employer is prejudiced if it was unable to effectively investigate the alleged injury or to provide medical services. *Jones Stevedoring Co. v. Director*, 133 F.3d 683 (9th Cir. 1997); *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972 (5th Cir. 1978). Conclusory statements or mere allegations of difficulty investigating the claim are insufficient to establish prejudice. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 424 (5th Cir. 1989); *Williams v. Nicole Enterprises*, 21 BRBS 164, 169 (1988). In the absence of substantial evidence to the contrary, it is presumed that the employer has been given sufficient notice. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

As stated above, the timeline for filing a claim does not begin until the claimant is aware of the relationship between his injury and his employment. A claimant cannot be expected to be aware that he has suffered cumulative trauma until a doctor or other person with expertise puts him on notice. Here, it is unclear when Claimant was aware that his work activities caused cumulative trauma to his knee, as the medical records do not show that his doctors ever told him that his ongoing knee problems were work-related. Thus, it cannot be proven that Claimant gave notice more than thirty days after he was aware that his injury was related to his work.

Moreover, I find that Employer was, or should have been, aware of a potential cumulative trauma injury. Shortly after he started working for Employer, Claimant told Mr. Kelsey and Mr. Correa, who were his superiors, that he had a knee condition that would probably require surgery. TR at 351-52, 369-70; RX 19 at 2; RX 20 at 1. Claimant also complained of knee problems and pain to his supervisors and co-workers, included Mr. Kelsey, Ms. Opiana-Lee, Mr. Morgan, and Mr. Han. TR at 282-84; RX 21, RX 23; RX 24; RX 54 at 20. Claimant also notified them of his scheduled surgery. RX 19; RX 21; RX 22. Thus, Employer was aware of Claimant's pre-existing knee condition.

However, Mr. Kelsey stated that he did not think he needed to inquire or worry about Claimant's knee condition because it was pre-existing. RX 19 at 2. He denied being on notice of the fact that Claimant's work could aggravate his condition because he did not know what Claimant's condition was and because Claimant could do the job. TR at 371-72. I note that it is irrelevant whether Employer understood the nature of Claimant's pre-existing condition and whether he could do the job. I also do not find it credible that Employer was unaware of a potential cumulative trauma injury. First, Mr. Kelsey stated that after Claimant notified him of his scheduled surgery, "[t]here was concern that Earl and I voice to [Claimant] about making it through Bayfest 2004 without aggravating his knee and impact his surgery. [Claimant's] response was that he would keep it in check and pace himself to get through Bayfest." RX 19 at 2. This demonstrates that Employer was aware that Claimant's work could aggravate his knee condition. Second, Claimant's supervisors and co-workers noted increased knee complaints and general exhaustion in 2004, which they attributed to his second job. RX 19 at 2; RX 21; RX 20 at 1; TR at 291. In particular, Ms. Opiana-Lee wrote that she "told him many…times that he shouldn't be working the other job if his knee keeps hurting. I also told him he should be wearing a knee brace." RX 21. This demonstrates that, at the very least, Employer was aware that work in general can aggravate a knee condition and the combination of Claimant's two jobs

was aggravating his knee condition. For all of these reasons, I find that Employer was aware of a potential cumulative trauma injury to Claimant's knee.

In addition, I find that Employer was not prejudiced by any delay in Claimant's providing notice of his cumulative trauma injury. Employer had the same ability to investigate Claimant's work activities, medical records, and other evidence relating to his cumulative trauma injury when he filed his claim on November 1, 2004 as is would have if he had notified them of his injury at any earlier point. Mr. Kelsey also conceded that he was not aware of any problems investigating Claimant's claim. TR at 365-66.

Therefore, Claimant's claim for compensation based on his cumulative trauma injury is not barred for failure to provide Employer with timely notice.

b. Section 13 – Time for Filing Claims

Under section 13, a claim for compensation is barred unless it is filed within one year of the date the claimant becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. § 13(a). A claimant is not "aware" of the relationship between his injury and employment until he knows "the full character, extent and impact of the harm done to him." *Abel v. Director, OWCP*, 932 F.2d 819 (9th Cir. 1991). A claimant is aware of the full character, extent, and impact of his injury when he knows that the injury is work-related and knows or should know that the injury will impair his earning power. *Id.* at 821.

As discussed above, it is unclear when Claimant was aware that his work activities were causing cumulative trauma to his knee, as the medical records do not demonstrate that his treating doctors ever told him that his ongoing knee problems were work-related. Thus, given that there is no evidence to establish that Claimant filed his claim more than one year after he was aware that he had a cumulative trauma injury related to his employment, I find that Claimant's cumulative trauma claim was timely filed.

2. Fact of Injury and Causation

Section 20(a) of the Act provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act." 33 U.S.C. § 920(a). Thus, to invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem*., 600 F.2d 280 (D.C. Cir. 1979), and working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *U.S. Industries/ Federal Sheet Metal, Inc.* v. Director, OWCP, 455 U.S. 608, 615 (1982). However, a claimant is entitled to invoke the presumption if he or she presents at least "some evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990).

I find that Claimant is able to establish a *prima facie* case with regard to his claim for a cumulative trauma injury to his right knee. Prior to starting work for Employer, Claimant had not sought treatment for his right knee since 1989. RX 39 at 54, 56. He testified that his knees were "fine" or "good" at the time he started work. TR at 112. Then, between the time he started work and Bayfest 2003, Claimant started complaining of knee problems and pain to his supervisors and co-workers. TR at 282-84, RX 21; RX 23; RX 24; RX 54 at 20. He first sought treatment for his right knee on January 9, 2004. CX 1 at 60-61; RX 39 at 124-25. Claimant was treated for right knee pain and problems numerous times in 2004. CX 1 at 39-56; RX 39 at 126-146. Ultimately, his knee required surgery on August 9, 2004. CX 1 at 23-38; RX 39 at 147-48. Claimant testified that this surgery was necessary because "[i]t got to a point that I was no longer [going] to be able to walk comfortably with my right knee, only because the swelling was up and even when I went home during the night, my swelling was still up when I had to ice my knee and it was getting to be a continuous basis." TR at 135-36. This evidence establishes that Claimant's right knee condition worsened after he started working for Employer.

Claimant has also presented some evidence tending to establish that his work activities could have caused or contributed to the worsening or acceleration of his knee condition. Dr. Hager opined in his May 30, 2005 report that Claimant "has been working in a position that clearly has caused cumulative injury to his right knee….Working in this job with a knee meniscus injury would undoubtedly result in further cumulative injury and worsening of whatever arthritic condition preexisted the injury." CX 4 at 78. Again, in his May 6, 2006 report, Dr. Hager opined that working in a job with duties such as those described for Claimant's job "with [existing] knee meniscus damage would be expected to result in cumulative injury and worsening of any preexisting arthritic condition." CX 11. He emphasized that Claimant "may have had preexisting right knee problems, but he was able to work without difficulty until his injury of July 1, 2003 and associated cumulative trauma related to his heavy duty job." CX 11 at 95. Similarly, Dr. Hager testified at the hearing that Claimant's knee condition had been "hastened and accelerated by the work activity." TR at 56-57, 89. Dr. Hager discussed Claimant's specific job duties as causes of cumulative trauma. TR at 52, 57, 84-86, 90, 93. Finally, he testified that Claimant's August 2004 surgery was due, at least in part, to cumulative trauma caused by his work for Employer. TR at 90. This evidence is sufficient to establish a *prima facie* case that Claimant's work for Employer caused cumulative trauma to his right knee, and therefore, the section 20(a) presumption has been invoked.

Once the section 20(a) presumption is invoked, the burden shifts to the employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The ultimate burden of proof then rests on the claimant under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Employer has presented substantial evidence that Claimant's knee condition is not causally related to his employment. Employer points to Claimant's extensive medical history of treatment for knee problems dating back to 1977. In particular, Claimant was diagnosed with

right knee osteoarthritis, torn medial meniscus, and chondromalacia of the patella, and required a partial medial meniscectomy in 1989. RX 39 at 40-47. This establishes that Claimant had a pre-existing right knee condition prior to working for Employer.

Employer also presented evidence that Claimant's knee condition and need for surgery after starting work for Employer was due to the natural progression of his pre-existing condition and not due to his work for Employer. In his June 8, 2005 report, Dr. Smith opined that the data from Claimant's medical records of treatment for knee problems since 1987 and his complaints to co-workers about pre-existing knee pain and need for surgery "documents that causation has not been established for the 8/9/04 right knee surgery being necessitated by the alleged 7/1/03 injury or by cumulative trauma. The cumulative data however documents that the 8/9/04 right knee surgery was necessitated solely by the preexisting condition." RX 73 at 4-6. Although he did not explain his basis for knowledge, Dr. Smith noted that Claimant would have been operated on by a different surgeon if Kaiser had determined that his condition was work-related. RX 73 at 2. Similarly, Dr. Smith opined in his April 13, 2006 report that the impairment due to arthritis that was shown on his standing x-rays "is related to the natural progression of the pre-existing condition, and …not to any July 1, 2003 injury or cumulative trauma at work." RX 90 at 3. Finally, in his deposition, Dr. Smith opined that there was no evidence of cumulative trauma due to Claimant's work activities. RX 86 at 45, 52-53, 59-60, 68-69. This evidence is sufficient to rebut the section 20(a) presumption.

Thus, I now must weigh all of the evidence and decide based on the record as a whole whether Claimant has met his burden of proving causation. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). In weighing medical evidence concerning a worker's injury, a treating physician's opinion is normally entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). However, in this case, neither Dr. Hager nor Dr. Smith was Claimant's treating physician, so their opinions must be assigned weight according to their credibility and persuasiveness. I find that Dr. Hager's opinion with regard to causation is more credible that Dr. Smith's for a number of reasons.

I find that Dr. Hager's opinion was clear and there is no reason not to credit it. Dr. Hager is well-qualified and experienced with regard to the issues in this case. TR at 36-37, 40-41. He spoke clearly and knowledgeably about what causes cumulative trauma to the knee. TR at 38-39. In giving his opinion that Claimant's work caused cumulative trauma, Dr. Hager referred to Claimant's actual job duties. TR at 45, 49, 57, 84-86, 90, 93. Dr. Hager's opinion is supported by the evidence of Claimant's increased right knee complaints and his need for treatment and surgery after starting work for Employer. In addition, Dr. Hager's opinion comports with common sense: it is difficult to believe that Claimant's very heavy work, including lifting 175-pound concrete blocks by himself, RX 21 and RX 23, would not aggravate or accelerate his knee condition. Lastly, Dr. Hager testified that one-hundred percent of his patients are injured persons "pursuing benefits from insurance companies." TR at 75. While this may be evidence of bias, it is not determinative of bias with no additional evidence to support it.

On the other hand, I find that Dr. Smith is biased and his opinions deserve less credit. First, Dr. Smith emphasized that he is an "independent" medical examiner and considers it part of his function "to challenge diagnoses that have no objective basis and are not truthful or are errant in conception." RX 86 at 31. He asserted that he is independent because "the opinions that are expressed are independent from the source that is asking for the evaluation." RX 86 at 32. I note that neither Dr. Smith nor Dr. Hager is independent, because they were both hired medical experts in this case. Moreover, Dr. Smith's opinions in this case suggest that he is biased in favor of the source that is asking for the evaluation, not independent from it. Second, I find that the Dr. Smith's comments on the credibility and integrity of Dr. Hager tend to raise questions about his own biases. In fact, Dr. Smith admitted his own bias when he stated, "I tend to look at anything Dr. Hager says with a little bit of bias, or jaundiced eye, and then I try to mitigate against what I would consider…erroneous conceptions or false diagnoses that he makes." RX 86 at 33. Third, although this would not be determinative of bias on its own, I note that ninety-eight percent of Dr. Smith's work is doing evaluations and serving as a medical expert, the vast majority of which he does on behalf of employers and insurance companies. RX 86 at 27-29. In addition, Dr. Smith had trouble recalling the last time he had worked on behalf of an injured worker, and estimated it had been over two years ago. RX 86 at 30. For all of these reasons, I find that Dr. Smith is biased and his opinions are entitled to little weight.

Dr. Smith's bias was confirmed by his evasive deposition testimony. For example, when asked whether "considerable walking, standing, stooping, bending, squatting, kneeling, climbing, twisting, reaching, stretching and arm movement would not accelerate, aggravate or hasten [Claimant's] osteoarthritis," Dr. Smith responded that "these are activities of daily living, and…there was no timely report of any industrial accident. There was no report on 7-1-03." RX 86 at 53. I find this response evasive, since whether these are activities of daily living and whether there was a timely report of the alleged July 1, 2003 injury are irrelevant to whether such activities could aggravate Claimant's condition. Similarly, when asked whether activities of daily living caused a progression of Claimant's condition, Dr. Smith responded by discussing Claimant's history of knee injuries and knee complaints dating back to the 1970s and stated, "So there's nothing that would favor that there was any substantial aggravation by his activities of daily living at the job." RX 86 at 55. I find this response similarly evasive, because the fact that Claimant had a pre-existing knee condition is not dispositive of the question of whether any activities of daily of living or activities on the job could have aggravated that condition. Finally, when asked whether Claimant's heavy work would not accelerate his condition, Dr. Smith responded that "the records show that the first evidence of any industrial accident was noted by the physical therapist on 8-18-04, which was after the operation, and there was no indication that he claimed any workers' comp[ensation] injury until four months after the operation, which was…14 to 16 months, after the alleged 7-1-03 incident. So there's just nothing that documents the cumulative trauma theory." RX 86 at 70. Once again, I find this response evasive, because Claimant's failure to timely report the alleged July 1, 2003 injury is irrelevant to whether his heavy work accelerated his pre-existing condition.

In addition, Dr. Smith opined repeatedly that there was no objective evidence of cumulative trauma due to Claimant's work. RX 86 at 45, 52-53, 59-90, 68-69. I note that the uniformity and the repetition of these opinions, even in response to varied and unrelated questions, suggest that Dr. Smith had an automatic, biased response to questions regarding

causation. I also note that these conclusory statements were not supported by discussion of why or how Claimant's specific work activities did not cause cumulative trauma. In addition, the more substantive parts of Dr. Smith's testimony conflict with these conclusory statements and actually support a diagnosis of cumulative trauma. Most notably, Dr. Smith conceded that even activities of daily living inevitably cause "adverse stresses" and degeneration in a patient who has had a partial medial meniscectomy and preexisting osteoarthritis. RX 86 at 59, 67.

After weighing the evidence as a whole, I find that Claimant's pre-existing knee condition was aggravated and accelerated by his work for Employer such that he sustained a compensable injury under the Act.

Intervening Cause

Under section 902(2) of the Act, if a claimant suffers an injury at work and subsequently sustains an injury or aggravation outside of work or at another job, the employer is liable for the entire disability when the subsequent injury or aggravation naturally or unavoidably results from the original work injury. *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454, 457 (1954). If the subsequent progression of the condition is not a natural or unavoidable result of the original work injury, but is the result of an intervening cause, the employer is relieved of liability for any disability attributable to the intervening cause. *Id.* Prior to analyzing intervening cause, the fact finder must find that the claimant's condition was aggravated due to some non-work-related event. Only after a determination is made that the claimant suffered such an aggravation of his condition does the inquiry turn to whether the incident causing the aggravation was an intervening cause or was the natural or unavoidable result of the original work injury.

Employer argues that Claimant's second job at NANA Services was an intervening cause. Employer asserts that "[e]ven if [Claimant] had experienced cumulative trauma in his work at MCCS, he experienced additional cumulative trauma at NANA Services aggravating his knee condition on a daily basis. This severs the chain of causation and terminates any liability MCCS may have." ALJX 6 at 24. However, Employer has not presented any specific evidence that Claimant's work for NANA Services aggravated his right knee condition. Even assuming Claimant's condition was aggravated by his second job, it does not necessarily follow that Employer is relieved of *all* liability for Claimant's disability, as Employer assumes. ALJX 6 at 22-24. Rather, when a claimant sustains an aggravation due to an injury in a non-work related incident or a second, non-Longshore job, the employer *remains liable* for any portion of the claimant's disability which is attributable to the original work-related injury. *See Marsala v. Triple A South*, 14 BRBS 39 (1981). In the present case, then, a finding that the second job aggravated Claimant's condition would only relieve Employer of any liability attributable to the second job. However, the parties have not presented any evidence quantifying the amount of injury or aggravation caused by Claimant's work for Employer relative to his work for NANA Services. Consequently, there is no way to ascertain what portion of claimant's disability is attributable to each injury. Without such apportionment, employer is liable for the entire disability. *See Bass v. Broadway Maintenance,* 28 BRBS 11, 15-16 (1994); *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140, 144-45 (1991).

For all of the reasons discussed above, I find that Claimant has suffered a cumulative trauma injury caused by his work for Employer. Consequently, Employer is liable for Claimant's disability, including the period of temporary total disability from August 9, 2004 through January 9, 2005 and permanent partial disability thereafter. Employer is also liable for Claimant's medical care resulting from his cumulative trauma right knee injury, beginning on January 9, 2004, which was the first day Claimant sought medical treatment for his right knee after starting work for Employer.

I note here that the parties stipulated that the period of Claimant's temporary total disability was from August 9, 2004 through January 9, 2005. However, there are some indications in the record that Employer believes that part of this period should not be compensable because it was due to his left wrist injury, which is unrelated to Claimant's employment or to his knee condition. I find that Claimant has established that his left wrist injury was causally related to his right knee condition. On September 23, 2004, Claimant told Mr. Kelsey and Mr. Correa that "he fell going down the stairs in his apartment building because his knee buckled out from under him" and that this new injury "would extend the time that he would be out and it was affecting his rehabilitation for his knee." RX 20 at 1. Claimant first sought treatment for his left wrist on September 24, stating that he had fallen on it. CX 1 at 15-16. This is sufficient to invoke the section 20(a) presumption. Employer presented an opinion from Dr. Smith that "the records reflect obfuscation and do not reflect any objective medical evidence that the reported fall that caused [Claimant] to injure his left wrist was the result of the right knee injury or surgery. The fall is not well documented." RX 42 at 36. Although it is unclear what objective medical evidence could prove the cause of Claimant's fall, Dr. Smith's opinion is sufficient to rebut the section 20(a) presumption. For all of the reasons discussed above, I reject Dr. Smith's opinion as biased and not credible. Therefore, I find that Claimant's wrist injury and the resulting extended recovery period are related to his knee injury and consequently, are compensable.

3. Extent of Disability

An injured employee covered by the Act is automatically entitled to a minimum level of compensation for a scheduled permanent partial disability under Sections 8(c)(1)-8(c)(20), 33 U.S.C. § 908(c)(1)-(c)(20). A scheduled award commences on the date the partial disability is permanent, which has been defined as the date of maximum medical improvement. *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). In this case, the parties stipulated that Claimant reached maximum medical improvement on May 1, 2005. Thus, scheduled benefits are due on this date.

If the administrative law judge has considered all of the medical evidence, she may base her findings on the percentage of loss of use on one medical opinion. *Wright v. Superior Boat Works*, 16 BRBS 17, 19 (1983). The administrative law judge is not confined to any particular guide or formula nor by a particular doctor's opinion. *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978). Use of the *AMA Guides* is only required in hearing loss cases pursuant to 33 U.S.C. § 908(c)(13)(E).

At the request of Dr. Hager, Dr. Chan conducted standing x-rays of Claimant's knees, which showed 1.3 mm of joint space medially in the right knee. CX 10 at 93.

Dr. Smith questioned Dr. Chan's measurement of the joint space on the grounds that "there is no documentation that the x-ray taken conforms to the standard required for ascribing arthritis impairments, as delineated in the AMA Guides." RX 90 at 2. Based on his own measurement with a translucent millimeter ruler, Dr. Smith found that Claimant had 2 mm of knee joint space medially in the right knee, which would qualify for a 20% lower extremity impairment rating. RX 90 at 2. However, Dr. Smith stated that "this impairment is related to the natural progression of the pre-existing condition, and…not to any July 1, 2003 injury or cumulative trauma at work." RX 90 at 3-4. Dr. Smith also opined that the partial medial meniscectomy performed on August 9, 2004 is assigned a 2% rating under the AMA Guides, but that Claimant is not entitled to this disability rating because the surgery was not necessitated by his work for Employer. RX 42 at 37; RX 90 at 3.

Dr. Hager confirmed with Dr. Cieply, who works with Dr. Chan at Queen's Medical Center, that "the images were taken digitally by standard procedure and the meniscal measurements were made electronically." CX 11 at 94. Dr. Hager stated, "Dr. Smith's impairment rating is based on his estimate made with a translucent ruler…[and] should be disregarded as it is not as accurate as a rating based on electronic measurement performed by a radiologist at Queen's Medical Center." CX 11 at 95. He testified that the most precise way to measure joint space is by computer, not by ruler. TR at 40, 56. Based on the ratings of 25% and 20% ascribed by the AMA Guides for knee cartilage measurements of 1 mm and 2 mm, respectively, Dr. Hager extrapolated that a knee cartilage measurement of 1.3 mm would result in an impairment rating of 23%. TR at 62. He also explained that Claimant would have been entitled to an additional 2% impairment rating based on the August 9, 2004 partial meniscectomy, but that this is cancelled out by having to subtract out 2% for the partial meniscectomy performed in 1989. TR at 62-64.

For the same reasons as discussed above with regard to causation, I find Dr. Hager more credible that Dr. Smith. In addition, I find that the electronic measurement of 1.3 mm of joint space, which was made when the standing x-rays were performed, is more reliable than Dr. Smith's measurement of 2.0 mm of joint space, which he made with a ruler. Based on Dr. Hager's testimony that the AMA Guides assign impairment ratings of 20% for 2.0 mm of joint space and 25% for 1.0 mm of joint space, TR at 62, I calculate that a measurement of 1.3 mm of joint space should be assigned an impairment rating of 23.5%. Therefore, I conclude that Claimant is entitled to a 23.5% scheduled rating for the lower right extremity. Compensation for partial loss of use of a member is based on a medical evaluation of a degree of loss. An award based on the schedule runs for the proportionate number of weeks attributable to the loss of use of the member. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569 (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513 (5th Cir. 1986). In this case, section 8(c)(2) provides for 288 weeks of compensation for loss of a leg. Multiplying 23.5% times 288 weeks, Claimant is entitled to 67.68 weeks of compensation.

4. Section 8(f) Relief

On July 28, 2005, Employer filed its application for section 8(f) relief, in which it argued that Claimant had serious, manifest, pre-existing partial disabilities that substantially and materially contributed to any disability from his right knee injury or stress injury. RX 80.

Under section 8(f), an employer may limit its liability for payment of permanent disability to 104 weeks compensation. 33 U.S.C. § 908(f). An employer is eligible for section 8(f) relief when a work-related injury combines with a pre-existing partial disability, resulting in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991).

However, under section 8(f), an employer must provide compensation for the first 104 weeks of a claimant's permanent disability. 33 U.S.C. § 908(f). As discussed above, Claimant is only entitled to 67.68 weeks of compensation (23.5% x 288 weeks = 67.68 weeks). Thus, even if Employer were eligible for section 8(f) relief, it would still be responsible for all of Claimant's compensation. In short, because a determination favorable to Employer would not result in relief being granted, I decline to decide at this time whether Employer is entitled to section 8(f) relief.

5. Average Weekly Wage

Section 10 of the Act provides for three methods for determining a claimant's average annual earnings in subsections 10(a), 10(b), and 10(c). That figure is then divided by 52, pursuant to section 10(d), to arrive at an average weekly wage ("AWW"). 33 U.S.C. § 910. The computation methods establish a claimant's earning capacity at the time of injury. See *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978).

Subsection 10(a) applies when an injured employee worked in the employment in which he was working at the time of the injury for substantially the whole of the year immediately preceding the injury. 33 U.S.C. § 910(a). Section 10(b) applies when the injured worker was not employed the whole of the year immediately preceding the injury, but there is evidence in the record of wages of similarly situated employees who did work substantially the whole of the year. When subsection 10(a) or 10(b) "cannot reasonably and fairly be applied," subsection 10(c) provides the default method for determining the appropriate average weekly wage. *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). Section 10(c) does not prescribe a fixed formula but requires the judge to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant. 33 U.S.C. § 901(c); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998).

After considering Claimant's circumstances, I find that subsection 10(a) and subsection 10(b) are inapplicable. Subsection 10(a) cannot be applied because neither Claimant nor Employer has earnings records for the full 52 weeks preceding Claimant's surgery on August 9, 2004. ALJX 5 at 26. (Claimant has provided evidence of his wages from 2002 and 2004, CX 6, and Employer has provided evidence of his wages from March through June 2003 and March 2004 through February 2005, RX 63). Subsection 10(b) cannot be applied because the parties

have not presented evidence regarding the earnings of similarly situated employees. Therefore, Claimant's average weekly wage must be calculated under section 10(c), as agreed by Claimant and Employer. ALJX 5 at 27; ALJX 6 at 26.

Claimant asserts that his AWW should be calculated based on his earning capacity up to the date that he first lost time due to his cumulative injury (August 9, 2004), or the time of last aggravation (August 8, 2004), citing *Merrill v. Todd Pacific Shipywards Corp.*, 25 BRBS 140 (1991). ALJX 7 at 1. Claimant also asserts that his earnings from NANA Services should be included, citing *Harper v. Office Movers*, 19 BRBS 128. ALJX 7 at 2. Accordingly, he calculates his AWW based on 2004 earnings of $16,430.31 from Employer and $4,089.21 from NANA Services. ALJX 5 at 27. Claimant's total earnings of $20,519.52, divided by 31 weeks, yields an average weekly wage of $661.92. ALJX 5 at 27.

On the other hand, Employer asserts that Claimant's AWW should be based on his earnings in the 18 weeks prior to his July 1, 2003 traumatic injury. In the alternative, Employer asserts that Claimant's AWW should be calculated based on his earnings prior to January 9, 2004, the date that he first sought treatment for his knee. ALJX 8 at 2. Employer also asserts that Claimant's earnings from NANA Services should be excluded because he started working there after July 1, 2003 and because the work was dissimilar from his work for Employer. ALJX 6 at 26; ALJX 8 at 2. Accordingly, Employer calculates Claimant's AWW based on his earnings in the 18 weeks prior to July 1, 2003 of $6,645.28, for an AWW of $369.18.

Subsection 10(c) provides for the consideration of "other employment of [the injured] employee, including the reasonable value of the services of the employee if engaged in self-employment." 33 U.S.C. 910(c). In addition, the case law provides that a claimant's average weekly wage at the time of injury is to be determined by considering all sources of income, not just his earnings from the job at which he was injured. *Liberty Mutual Insurance Co. v. Britton*, 233 F.2d 699, 701-702 (D.C. Cir. 1956); *Cernousak v. Brawell Shipyards, Inc.*, 19 BRBS 796, 804 (ALJ)(1987); *Bacon v. General Dynamics Corp*., 14 BRBS 408, 411 (1981); *Lawson v. Atlantic & Gulf Grain Stevedore Co.*, 6 BRBS 770 , 777 (1977); *Stutz v. Independent Stevedore Company, Inc.*, 3 BRBS 72 (1975). Earnings from two or more jobs should only be included where the claimant's ability to earn wages in both the job in which he was injured and his other job(s) were affected by his work-related injury. *Harper v. Office Movers*, 19 BRBS 128, 130 (1986). Because Claimant's work for NANA Services involved physical labor, I find that his ability to do that job was affected by his injury and therefore, his wages from that job should be included in the calculation of his AWW.

In 2004, Claimant earned $16,430.31 working for Employer and $4,089.21 working for NANA Services, for a total of $20,519.52 from both jobs. CX 6 at 86-87. This total for all of 2004 represents Claimant's earnings for the 31 weeks from January 1, 2004 through August 8, 2004, given that he was totally disabled and did not work from the time of his surgery on August 9, 2004 through January 2005. I conclude that the $20,519.52 that Claimant earned in the 31 weeks preceding his surgery accurately represents his earning capacity at that time. However, since this calculation should "reasonably represent the annual earning capacity" of the claimant under subsection 10(c), his earnings must be extrapolated to what he would have earned in 52

weeks, which is $34,419.84. This amount is then divided by 52 pursuant to section 10(d), which produces an average weekly wage of $661.92 and a compensation rate of $441.28.

CONCLUSION

I find that Claimant timely noticed and filed his claim for the cumulative trauma injury under sections 12 and 13 of the Act. I also find that, as a result of his work for Employer from February 23, 2003 through November 1, 2004, Claimant sustained a cumulative trauma injury, which aggravated his pre-existing right knee condition. The extent of Claimant's permanent partial disability is 23.5%. Employer is not entitled to section 8(f) relief because Claimant's permanent partial disability compensation will not extend beyond 104 weeks. Claimant's average weekly wage is $661.92.

ORDER

1. Employer shall pay Claimant temporary total disability compensation at the compensation rate of $441.28 per week from August 9, 2004 through January 9, 2005.

2. Employer shall pay Claimant permanent partial disability compensation at the compensation rate of $441.28 for 67.68 weeks beginning on May 1, 2005.

3. Employer is liable for Claimant's medical care related to Claimant's right knee condition from January 9, 2004 to the present, and continuing.

4. Employer shall pay Claimant interest on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. § 1961.

5. All computations are subject to verification by the District Director, who in addition shall make all calculations necessary to carry out this order.

6. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on counsel for Employer within 21 days of the date this Decision and Order is served. Counsel for Employer shall provide the undersigned and Claimant's counsel a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of Employer's Statement of Objections, Claimant's counsel shall initiate a verbal discussion with counsel for Employer in an effort to amicably resolve as many of Employer's objections as possible. If the counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of Employer's Statement of Objections,

Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for Employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Employer no later than 30 days after service of Employer's Statement of Objections. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

7. The parties will immediately notify this office upon filing an appeal, if any.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

ABT:eh